IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 11-1208

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTINE A. KERN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
THE HONORABLE ARTIS REIS,
THE HONORABLE DOUGLAS STASKAL, AND
THE HONORABLE ROBERT B. HANSON, JUDGES

APPELLEE'S BRIEF AND CONDITIONAL NOTICE OF ORAL ARGUMENT

THOMAS J. MILLER
KEVIN CMELIK
Attorney General's Office
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
Ph: 515/281-5976 Fax: 515/281-4902
e-mail: jpettin@ag.state.ia.us

JOHN SARCONE
Polk County Attorney

JOSEPH CRISP & ANDREA PETROVICH
Assistant County Attorneys

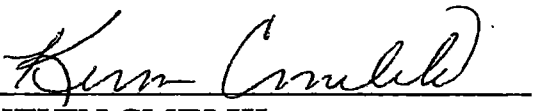
ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

PROOF OF SERVICE

On March 8, 2012, I, the undersigned, did serve the within Appellee's Brief and Argument on all other parties to this appeal by mailing one copy thereof to the respective counsel for said parties:

Christopher Kemp
Kemp Eason Sease & Dyer
604 Locust St., Suite 500
Des Moines, IA 50309



KEVIN CMELIK
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
Telephone: 515/281-5976
Fax: 515/281-4902

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE CODES

MISCELLANEOUS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WAS THE SEARCH OF DEFENDANT'S HOME JUSTIFIED UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 8 OF THE IOWA CONSTITUTION?

Authorities

State v. Vest, 225 N.W.2d 151 (Iowa 1975)

State v. Ochoa, 792 N.W.2d 260 (Iowa 2010)

State v. Kreps, 650 N.W.2d 636 (Iowa 2002)

State v. Breuer, 577 N.W.2d 41 (Iowa 1998)

State v. Turner, 630 N.W.2d 601 (Iowa 2001)

Samson v. California, 547 U.S. 843, 126 S.Ct. 2193 (2006)

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (2006)

Pennsylvania Bd. Of Probation and Parole v. Scott, 524 U.S. 357, 118 S.Ct. 2014 (1998)

U.S. v. Knights, 534 U.S. 112, 122 S.Ct. 587 (2001)

Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297 (1999)

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)

Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946 (2001)

State v. Turner, 297 S.W.3d 155 (Tenn. 2009)

State v. Carlson, 548 N.W.2d 138 (Iowa 1996)

New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985)

Lafare, Search and Seizure: A Treatise on the Fourth Amendment, § 10.10 (4th Ed. 2011)

Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164 (1987)

United States v. Carolina, 903 F.2d 60 (1st Cir. 1990)

United States v. Polito, 583 F.2d 48 (2nd Cir. 1978)

Mary Elisabeth Naumann, The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception, 26 Am. J. Crim. L. 325 (1999)

State v. Crawford, 659 N.W.2d 537 (Iowa 2003)

State v. Anderson, 142 Wis.2d 162, 417 N.W.2d 411 (Wis. Ct. App. 1987)

Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996)

Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523 (1973)

United States v. Quezada, 448 F.3d 1005 (8th Cir. 2006)

State v. Kersh, 313 N.W. 2d 566 (Iowa 1981)

State v. Lake, 476 N.W.2d 55 (Iowa 1991)

II. DID THE DISTRICT COURT CORRECTLY FIND THE DEFENDANT GUILTY OF THE FOUR CHARGES- VIOLATIONS INVOLVING CONTROLLED SUBSTANCES- BASED ON THE SUBSTANTIAL EVIDENCE FOUND IN THE MINUTES OF TESTIMONY?

Authorities

State v. Abbas, 561 N.W.2d 72 (Iowa 1993)

State v. Thomas, 561 N.W.2d 37 (Iowa 1997)

State v. Torres, 495 N.W.2d 678 (Iowa 1993)

State v. Casady, 491 N.W.2d 782 (Iowa 1992)

Iowa Code § 124.401 (2011)

Iowa Code Chapter 706

Iowa Code § 706.1 (2011)

State v. Speicher, 625 N.W.2d 738 (Iowa 2001)

State v. Mapp, 585 N.W.2d 746 (Iowa 1998)

16 Am.Jur.2d *Conspiracy* § 10 (1998)

State v. Fintel, 689 N.W.2d 95 (Iowa 2004)

State v. Carter, 696 N.W. 2d. 31 (Iowa 2005)

State v. Bash, 670 N.W.2d 135 (Iowa 2003)

State v. Maghee, 573 N.W.2d 1 (Iowa 1997)

State v. Webb, 648 N.W.2d 72 (Iowa 2002)

State v. Reeves, 209 N.W.2d 18 (Iowa 1973)

State v. Boyd, 224 N.W.2d 609, 612 (Iowa 1974)

State v. Seager, 341 N.W.2d 420 (Iowa 1997)

State v. See, 532 N.W.2d 166 (Iowa 1995)

State v. Luter, 346 N.W.2d 802 (Iowa 1984)

State v. Maghee, 573 N.W.2d 1 (Iowa 1997)

Iowa Code § 453B.12 (2011)

Iowa Code § 453B.1 (2011)

ROUTING STATEMENT

Because a parolee's Fourth Amendment right protecting against an unwarranted search and seizure as analyzed presents substantial constitutional questions and questions of enunciating or changing legal principles transfer to the Court of Appeals would not be appropriate in this case. Iowa R. App. P. 6.1101(2)(a), (f).

STATEMENT OF THE CASE[1]

Nature of the Case: The Defendant-Appellant, Christine Ann Kern, appeals from the judgment and sentence entered upon her conviction of Count I, Conspiracy to Manufacture a Controlled Substance - marijuana, in violation of Iowa Code section 124.401(1)(d)(2011); Count II, Manufacturing a Controlled Substance -marijuana, in violation of Iowa Code section 124.401 (1)(d)(2011); Count III, Possession of a Controlled Substance - marijuana- with Intent to Deliver, in violation of Iowa Code section 124.401(1)(d)(2011); and Count IV, Drug Tax Stamp Violation, in violation of Iowa Code section 453B.12 (2011). She challenges the suppression ruling filed on April 13, 2011, in the District Court of Polk County, Iowa.

Course of Proceedings: The State filed the Trial Information, charging Defendant-Appellant, Christine Ann Kern, with the following four Counts: Count I, Conspiracy to Manufacture a Controlled Substance - marijuana, in violation of Iowa Code

---

[1] The undersigned gratefully acknowledges the assistance of legal intern, Calynn Walters, on the research and composition of this brief.

section 124.401(1)(d)(2011); Count II, Manufacturing a Controlled Substance -marijuana, in violation of Iowa Code section 124.401 (1)(d)(2011); Count III, Possession of a Controlled Substance - marijuana- with Intent to Deliver, in violation of Iowa Code section 124.401(1)(d)(2011); and Count IV, Drug Tax Stamp Violation, in violation of Iowa Code section 453B.12 (2011). (Trial Information)(App.001).

On March 1, 2011, Kern filed an Application to Join Co-Defendant's motion to suppress. (Application to Join)(App.017). The Honorable Judge Artis Reis heard the Motion to Suppress filed by Co-Defendant Grant and joined by Defendant-Appellant Kern. (Supp. Tr. p. 3, ln. 3-5)(App.018). Judge Artis Reis overruled the motion to suppress at the close of the hearing for both defendants on April 12, 2011. (4/12/11 Order)(App.058).

Kern waived her right to a jury trial, consented to a trial to the court, and stipulated to the facts on the record. (Order: re: Finding)(App.059). The Honorable Judge Douglas F. Staskal found Kern guilty beyond a reasonable doubt on June 6, 2011, of conspiracy to manufacture a controlled substance, manufacturing a

controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a tax stamp. (Order: re: Finding of Guilt)(App.059). Defendant Kern filed a timely notice of appeal within 30 days after final judgment. (Notice of Appeal)(App.078).

Statement of Facts: On November 5, 2010, Detectives Jenkins and Chance accompanied Ms. Staci Huisman, an Iowa Department of Human Services child protective assessment worker, on a "home visit." (Min. of Testimony)(App.004). Ms. Huisman had received a child abuse report about a "marijuana grow" existing in the basement of the residence - 518 East 28th Street in Des Moines, Polk County, Iowa - where two minors, 16-year-old Ashlie Kern and her two-month-old son, lived with her mother, Defendant Christine Ann Kern, and Kern's long-term boyfriend, Sean L. Grant. (Min. of Testimony)(App.004). Grant is a union carpenter, and has been in a relationship with Defendant Kern, an employee at Big Lots, since 1986, and they have owned the house since 2005. (Min. of Testimony)(App.004-005).

Upon arrival at the residence of Grant and Kern, Kern met and invited the detectives and Ms. Huisman into the front room, where Grant and Ashlie Kern were present. (Min. of Testimony)(App.004). Ms. Huisman explained the situation and the reason for their presence. (Min. of Testimony)(App.004).

During the detectives' introduction and explanation of the situation, the detectives noticed both Kern and Grant become very defensive. (Supp. Tr. p. 67 ln. 11-15) (App.047). Detective Jenkins asked Grant to consent to a search. (Min. of Testimony)(App.004). Grant quickly denied a consent search, and when asked by Detective Jenkins whether a "marijuana grow" existed in the basement, Grant responded "no". (Min. of Testimony, Supp. Tr. p. 69 Ln. 11)(App.004;049). Because Grant and Kern denied a consent search, Ms. Huisman explained she could not confirm the safety of the residence. (Min. of Testimony)(App.004). Without a search, Ashlie Kern and her two-month-old son would be removed from the residence and would stay with Ashlie's father in Pleasant Hill, Iowa. (Min. of Testimony)(App.004). Defendant Kern and Grant still did

not allow the consent search, so Ashlie packed her and her son's things, and they were removed from the residence. (Min. of Testimony)(App.004).

Detectives Jenkins and Chance and Ms. Huisman also left the residence and reconvened about two blocks south of the house, where Ms. Huisman informed Detective Jenkins that Kern was on parole. (Min. of Testimony)(App.004). Detective Jenkins called the Parole and Probation office and spoke with Sergeant Garvey. (Min. of Testimony)(App.004). Detective Jenkins confirmed Kern was on parole and informed Sergeant Garvey of the situation involving the report of a "marijuana grow" in the basement of the defendant's residence. (Min. of Testimony)(App.004).

Sergeant Garvey asked the detectives to search the residence at 518 East 28th Street, Des Moines, Polk County, Iowa, based on the defendant's parole agreement and exigent circumstances. (Min. of Testimony)(App.005). Sergeant Garvey also stated that he would not be available right away and would arrive at the residence once he was free. (Min. of Testimony)(App.005). After talking with

Sergeant Garvey, Detective Jenkins observed Defendant Kern leave the house, walk to her car, and return to the residence. (Supp. Tr. p.49 Ln. 11-15)(App.041). Based on Kern's actions, Detective Jenkins was worried Kern would leave or remove evidence from the house. (Supp. Tr. p.49 Ln. 11-15)(App.041).

Detectives Jenkins and Chance therefore returned to the residence. (Min. of Testimony)(App.005). Once there, the detectives explained to Grant and Kern that based on the conditions of Kern's parole agreement, Sergeant Garvey had asked the detectives to search the house. (Min. of Testimony)(App.005). Grant stated he wanted to call his attorney and the detectives advised him he could call. (Min. of Testimony)(App.005). Defendants Kern and Grant stayed in the front room with Detective Jenkins, while Detective Chance walked downstairs. (Min. of Testimony)(App.005). In the basement, Detective Chance found three separate "marijuana grow" operations. (Min. of Testimony)(App.005). Detective Chance returned upstairs and relayed his observations to Detective Jenkins. (Min. of Testimony)(App.005).

At that time, Grant was advised of his constitutional rights. (Min. of Testimony)(App.005). Grant acknowledged he understood his rights and agreed to talk with law enforcement. (Min. of Testimony)(App.005). Grant told the Detectives that the "grow" operation was his and Defendant Kern had no part in the operation that he ran for the past 5 months. (Min. of Testimony)(App.006). He also stated the "grow" was for personal use only and not for sale. (Min. of Testimony)(App.006). Grant mentioned later that Defendant Kern had no knowledge of the operation and was never allowed in the basement or the drying room. (Min. of Testimony)(App.006).

After speaking with the detectives, Grant asked to get dressed. Detective Chance asked Grant if any weapons existed upstairs and Grant replied "yes." (Min. of Testimony)(App.005). Detective Chance escorted Grant upstairs to change, and in the bedroom Detective Chance observed a large bowl of marijuana and a mason jar containing marijuana on the end table. (Min. of Testimony)(App.005). Grant told Detective Chance that Defendant Kern shared the bedroom. (Min. of Testimony)(App.005). Once

Grant was dressed, they proceeded downstairs. (Min. of Testimony) (App.005).

While Detective Chance was talking with Grant in the front room, Detective Colby found a spare bedroom that was converted into a drying room. The drying room contained large amounts of marijuana in various stages of drying. (Min. of Testimony)(App.005). Also, located on the room's floor, there were several mason jars full of marijuana and a large glass jar with 18 individual plastic baggies full of marijuana. (Min. of Testimony)(App.005).

On November 8, 2010, Detective Chance processed the evidence. (Min. of Testimony)(App.006). In all, 18,602.50 grams of marijuana were found in multiple areas of the house, including in the dresser of the front room, on the end table, in and on the dresser in the bedroom, the spare bedroom/drying room, and in the basement. (Min. of Testimony)(App.005-007). Also, a 9- mm handgun and a sawed-off shotgun, considered an offensive weapon, were found in the residence. (Min. of Testimony)(App.006).

ARGUMENT

I. THE SEARCH OF DEFENDANT'S HOME WAS JUSTIFIED UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 8 OF THE IOWA CONSTITUTION.

Preservation of Error: The Defendant's Application to Join Co-Defendant Grant's Motion to Suppress and the District Court's ruling thereon preserved this claim for review. *State v. Vest,* 225 N.W.2d 151, 152 (Iowa 1975).

Standard of Review: The motion to suppress involved issues of a defendant's constitutional rights under the Fourth Amendment of the United States Constitution, and Article 1 section 8 of the Iowa Constitution during a search and seizure of a parolee's residence. Therefore, the court's review is de novo. *State v. Ochoa,* 792 N.W.2d 260, 264 (Iowa 2010)(citing *State v. Kreps,* 650 N.W.2d 636, 640 (Iowa 2002)) . In conducting the de novo review, the court "makes an independent evaluation based on the totality of the circumstances as shown by the entire record." *Id.* (citing *State v. Breuer,* 577 N.W.2d 41, 44 (Iowa 1998)). The Court should give "deference to the district court's fact findings due to its opportunity

to assess the credibility of witnesses, but is not bound by those findings." *State v. Turner,* 630 N.W.2d 601, 606 (Iowa 2001).

Discussion:

A. Defendant Kern Gave Consent for the Search of Her Residence through Her Parole Agreement, by Signing and Submitting to the Conditions After the Agreement was Clearly Explained.

In *Morrissey,* the Court reiterated the definition and purpose of parole: "[p]arole is release from prison, before the completion of a sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence [to help promote the reintegration and positive citizenship of parolees]." *Samson v. California,* 547 U.S. 843, 863, 126 S.Ct. 2193, 2194 (2006) (citing *Morrissey v. Brewer,* 408 U.S. 471, 477, 92 S.Ct. 2593-2598 (2006))(Stevens, J., Souter, J., Breyer, J., dissenting). Institutions with eligible inmates serving a determinate sentence may elect to allow those inmates to finish their sentence released from prison following certain rules. *Id.* The need to supervise parolees through these conditions and rules is due to the high probability of parolees'

committing or hiding future criminal activity. *Id.* at 2193 (citing *Pennsylvania Bd. Of Probation and Parole v. Scott,* 524 U.S. 357, 365, 118 S.Ct. 2014, 2020(1998) (internal quotations omitted)).

The State's need for effective supervision "warrant[s] privacy invasions that would not otherwise be tolerated under the Fourth Amendment," as long as the searches are not "arbitrary, capricious, or harassing." *Id.* at 2195. An eligible inmate should not expect "the absolute . . . [privacy] to which every citizen is entitled, because the State requires these conditions of parole as a substitute for fulfilling the entirety of the inmate's sentence in prison." *Samson,* 547 U.S. at 863, 126 S.Ct. at 2197 (citing *U.S. v. Knights,* 534 U.S. 112, 118, 122 S.Ct. 587, 591 (2001)(Souter, J., concurring). In each case, the inmate, who is granted the opportunity to receive parole, voluntarily decides if he or she wants to remain in prison or follow the rules and conditions of parole. *Id.* If electing parole, the inmate consents to the conditions - one of which is submitting to warrantless searches. *Id.*

In this case, Defendant Kern was sentenced to imprisonment for five years on October 13, 2008, for operating while intoxicated third offense. (State's Exhibit 1, p. 3)(App. X). Defendant Kern was granted parole on February 17, 2010, for the balance of her sentence. (State's Exhibit 2)(App.055).

Additionally, as in *Samson,* Defendant Kern had each condition and rule- including the search provision- clearly explained to her, and she chose to sign the order voluntarily subjecting herself to the conditions. *Id.* (Supp. Tr. p. 25, ln. 14-25)(App.029). By indicating she understood and signing the parole agreement, Defendant Kern consented to all the conditions in the parole agreement - including submitting her person, property, residence, vehicle, and personal effects to a search at any time with or without a search warrant, warrant of arrest or reasonable cause by any parole officer or law enforcement officer. (State's Exhibit 2, Condition P)(App.056).

According to Kern's parole agreement, her place of residence at the time of the search was 518 East 28th Street, Des Moines, Polk

County, Iowa. (Min. of Testimony, State's Exhibit 1)(App.004). She had given that address as her place of residence and contact information for her parole officer and her Law Enforcement Report confirmed the information. (Min. of Testimony, State's Exhibit 1, p. 1)(App.005).

Therefore, Defendant Kern consented, through her parole agreement, to submit her place of residence to unwarranted searches as long as the search is not "arbitrary, capricious, or harassing." *Samson,* 126 S.Ct. at 2194. The search conducted at Defendant Kern's place of residence by Detective Jenkins and Detective Chance did not violate Defendant Kern's Fourth Amendment rights.

In *Ochoa,* the Iowa Supreme Court rejected the concept set forth in *Samson* that a general law enforcement officer can conduct a broad, warrantless, suspicionless search of a parolee's person and residence. *State v. Ochoa,* 792 N.W.2d 260, 264 (2006) (citing *Samson,* 547 U.S. at 863, 126 S.Ct. at 2197). However, in this case, the detectives did not conduct a broad, suspicionless

search of the defendant's residence. The detectives had observed the defendant's actions and formed suspicions, which gave reason for the search of Kern's residence, and thus the search differs from that in *Ochoa*. (Min. of Testimony)(App.004-006).

B. The District Court Correctly Found that Detective Jenkins and Detective Chance had Reasonable Suspicion to Conduct a Warrantless Entry into Defendant Kern's Residence

"A parolee may be subjected to . . . warrantless search by a general law enforcement officer with particularized suspicion or limitations to the scope of the search, because the parole condition significantly diminishes [any] reasonable expectation of privacy." *State v. Ochoa,* 792 N.W.2d 260, 291 (citing *Knights,* 534 U.S. at 119-120, 122 S.Ct. at 592). The *Ochoa* Court expressly stated it did not decide the level of suspicion needed to satisfy the "reasonable suspicion" standard. *Id.* at 292. Given the reduced expectation of privacy held by a parolee, a search based on reasonable suspicion for probationary or investigatory purposes is permissible, even by

general law enforcement officers. *Knights,* 534 U.S. at 121, 122 S.Ct. at 592.

The touchstone of the Fourth Amendment is reasonableness. *Id.* Reasonableness is determined by analyzing the totality of the circumstances, which involves balancing the degree to which the search intrudes on the parolee's privacy with the need of the intrusion to promote legitimate government interests. *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297 (1999).

For a search to be reasonable the degree of individualized suspicion required is " a determination that a sufficiently high probability [usually probable cause] of criminal conduct makes the intrusion on the individual's privacy interest reasonable." *Knights,* 534 U.S. at 113, 122 S.Ct. at 589 (2001).

However, even though the Fourth Amendment usually requires probable cause, in a case involving a parolee or probationer a "lesser degree satisfies the . . . [Fourth Amendment] when the balance of the governmental and private interests makes such a standard reasonable." *Id.* (citing *Terry v. Ohio,* 392 U.S. 1,

88 S.Ct. 1868 (1968). The United States Supreme Court held in *Illinois v. McArthur* that the same circumstances that lead us to infer reasonable suspicion is "constitutionally sufficient" also renders warrants unnecessary. 531 U.S. 326, 330, 121 S.Ct. 946 (2001).

Thus, "when an officer has reasonable suspicion in a case that a parolee, subject to a search agreement in the parole agreement, engaged in criminal activity, and there is enough likelihood criminal conduct is occurring then an intrusion" on the parolee is reasonable. *Knights,* 534 U.S. at 113, 122 S.Ct. at 592.

State v. Ochoa states that a parole agreement does not give law enforcement officers the "blanket authority" to conduct searches without reason. 792 N.W.2d at 264. However, the Court also recognizes as a matter of federal constitutional precedent that as long as the law enforcement officer has reasonable suspicion in a case with a parole agreement, warrantless searches are justified. *Id.* Because parolees are finishing their incarceration sentence outside the prison setting, there is a greater risk that parolees are

conducting or hiding criminal activities that would result in harm to themselves and law-abiding members of society. This Court should find reasonable suspicion to be an adequate standard, similar to *Knights*. 534 U.S. at 113, 122 S.Ct. at 589.

Such a standard strikes an appropriate balance between privacy interests of the parolee and the government's interest in effective law enforcement. In fact, a majority of States have chosen this standard as appropriate. *State v. Turner,* 297 S.W.3d 155, 174 (Tenn. 2009)(collecting cases).

In this case, reasonable suspicion did exist. (Supp. Tr. p 91 Ln. 1)(App.054). Detective Jenkins and Detective Chance were called to accompany Ms. Huisman, who is responsible for child protection, on a home visit that was based on a child abuse report. The report stated two minors were living in a residence where a marijuana manufacturing activity existed in the basement and marijuana was smoked on a regular basis. (Supp. Tr. p. 8 Ln. 9-13)(App.021). The report also included information that the

mother/grandmother of the two minors lived there and was on parole. (Supp. Tr. p. 17 Ln. 3-6)(App.026).

At the home visit, after Ms. Huisman explained the situation to Defendant Kern, Kern became very defensive and quickly denied consent to search despite the parole agreement providing for a search. (Supp. Tr. p.67 Ln. 11-15)(App.047). Detective Jenkins stated his observations at the suppression hearing: "they appeared to me based upon my training and experience they didn't want me in the residence across a certain point, because Grant placed himself between me and the remainder of the house, even though the front room was a tiny area." (Supp. Tr. p. 68 Ln. 4-7)(App.048).

After the defendant refused to consent to a search, Ms. Huisman explained the minors would be removed, and Defendant Kern still denied a search. (Min. of Testimony)(App.004). Again the Detectives found this odd, "because if it had been an unfounded allegation they probably would have let us come in, search, and confirm nothing was wrong, so their children could stay in the residence." (Supp. Tr. p.76 Ln. 19-25)(App.052). Defendant Kern

was granted parole; as a condition of that parole she willingly subjected herself to searches without a warrant or reasonable cause. (Supp. Tr. p. 90 Ln. 4-7)(App.053).

These circumstances gave the parole officer, Sergeant Garvey, the authority to search the premises. (Supp. Tr. p. 90 Ln. 19-24)(App. 053). Sergeant Garvey asked Detectives Jenkins and Chance to perform the search. (Supp. Tr. p. 90 Ln. 19-24)(App.053). Detectives Jenkins and Chance therefore had the authority to search Defendant Kern's residence without a warrant based on reasonable suspicion and the search condition in Kern's parole agreement.

Therefore, the District Court correctly found there was reasonable suspicion to conduct a warrantless search of Defendant Kern's residence within the "confines of [the] call for protection of the community through DHS activities in investigat[ing] a child abuse reports[,] and given the direction and consent of the parole officer to complete the search" by Detective Jenkins and Detective Chance. (Supp. Tr. p. 91 Ln. 2-5)(App.054).

C. Supervision of a Parolee is a "Special Need" Justifying the Search of Defendant Kern's Residence.

In *State v. Carlson,* this Court held evidence obtained in violation of the Fourth Amendment is inadmissible unless the State proves by a preponderance of the evidence that a recognized exception to the warrant requirement applies. 548 N.W.2d 138, 140 (Iowa 1996). " In "exceptional circumstance," beyond the normal need for law enforcement, may make the warrant and probable-cause requirement impracticable." *New Jersey v. T.L.O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 748 (1985)(Blackmun, J., concurring).

Not surprisingly the federal courts have uniformly followed *Griffin* when dealing with 'exceptional circumstances'. Some criticism from commentators has been critical of *Griffin*, but the courts have not and followed it consistently. See Lafare, Search and Seizure: A Treatise on the Fourth Amendment, § 10.10 (4th Ed. 2011).

As with the educational system, government office or prison, or regulated industry, a State's operation of the probation and

parole system "presents 'special needs' beyond normal law enforcement activities that may justify departures from the usual warrant and probable-cause requirements." *Griffin v. Wisconsin,* 483 U.S. 868, 107 S. Ct. 3164, 3166 (1987) (citing *New Jersey v. T.L.O.,* 469 U.S. at 351, 105 S.Ct. at 748 (1985)).

Additionally, the Court in *Griffin* held the probation and parole system is a special need, because"[s]upervision is necessary to ensure that probation restrictions are in fact observed, that the probation serves as a genuine rehabilitation period, and that the community is not harmed by the probationer's being at large." *Id.* at 3166. The Court also noted a probation officer charged with protecting the public interest is also supposed to have in mind the welfare of the probationer. *Id* at 3169.

A probation agency thus is able to act on a lesser degree of certainty in order to intervene before the probationer or parolee "damages himself or society." *Id.* It is also reasonable "[for] information provided by a police officer, whether or not on the basis of firsthand knowledge, to support a probationary search. All

that is required is that the information provided indicates . . . the likelihood of facts justifying the search." *Id.* at 3166. Thus in *Griffin*, a detective's tip constituted sufficient grounds, since it came from someone who had no reason to supply inaccurate information, and " specifically identified Griffin [(the Defendant)], and suggested a need to verify Griffin's compliance with state law." *Id.* at 3168.

In *Griffin*, a detective told the parole agency that Griffin "had or may have had" an illegal weapon at his home. *Id.* at 3169. The Court held this information provided reasonable grounds to justify the search, because the Detective specifically identified Griffin and his need to comply with probation. *Id.* In the current case, the same situation occurred.

In the present case, the Department of Health and Social Services had a child abuse report about two minors living in a home with drug activity and a parolee. (Min. of. Testimony)(App.004). After the Detectives from the Mid-Iowa Narcotics Enforcement Task Force accompanied Ms. Huisman - a

DHS worker - to the house, they reported the information from the child abuse report and their observations while in Defendant Kern's residence to the parole agency. (Min. of Testimony)(App.004-005).

As in *Griffin*, the Probation and Parole agency had a right to act upon this tip without obtaining a warrant. *Id.* The information specified the location of the "marijuana grow" and that Kern was on parole, and the detectives had no reason to supply inaccurate information. *Id.* The information therefore constituted reasonable grounds under a "special need" exception. *Id.*

After Sergeant Garvey, on behalf of the probation and parole agency, decided to investigate the tip, he had another matter to attend to. (Min. of Testimony)(App.005). He therefore asked Detectives Jenkins and Chance to start the search and said he would arrive at the residence later. (Min. of Testimony)(App.005). According to Detectives and Sergeant Garvey, this is normal practice when the Probation and Parole office is busy. Therefore, the Probation and Parole agency had reasonable grounds to execute a warrantless search of Defendant Kern's residence, based on the

"special needs" exemption to the Fourth Amendment, and was able to delegate the authority to Detective Jenkins and Detective Chance. *United States v. Carolina,* 903 F.2d 60, 64 - 69 (1st Cir. 1990); see also *United States v. Polito,* 583 F.2d 48, 56 (2nd Cir. 1978)(police may assist parole officers).

D. Detective Jenkins and Detective Chance were Acting Under the Community Caretaker Exception to the Fourth Amendment.

Another exception to the Fourth Amendment warrant requirement is the Community Caretaker exception, which encompasses three doctrines: 1) the emergency aid doctrine, 2) the automobile impoundment/inventory doctrine, and 3) the public servant exception. Mary Elisabeth Naumann, The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception, 26 Am. J. Crim. L. 325, 331 (1999). The public servant doctrine, applicable in this case, is used in situations where the public servant may . . . believe that there is a difficulty requiring his general assistance. *State v. Crawford,* 659 N.W.2d 537, 543 (Iowa 2003).

"A community caretaking case requires a three-step analysis: (1) was there a seizure within the meaning of the Fourth Amendment?; (2) if so, was the police conduct bona fide community caretaker activity?; and (3) if so, did the public need and interest outweigh the intrusion upon the privacy of the citizen? *Id.* (citing *State v. Anderson,* 142 Wis.2d 162, 417 N.W.2d 411, 414 (Wis. Ct. App. 1987). If the circumstances satisfy all three parts of the test, then the use of the community caretaker exception is valid for the situation. *State v. Crawford,* 659 N.W.2d 537, 543 (Iowa 2003).

The first step is to assess whether a seizure occurred. *State v. Crawford,* 659 N.W.2d 537,543 (citing *Anderson,* 417 N.W.2d at 414. "When the police . . . temporarily detain a citizen, that detention is a "seizure"within the meaning of the Fourth Amendment. This is true even though the detention is only for a brief period of time and for a limited purpose. *Whren v. United States,* 517 U.S. 806, 809–10, 116 S.Ct. 1769, 1772 (1996). Detective Jenkins 'seized' Defendant Kern by temporarily detaining her in the

front room, while Detective Chance went into the basement to determine if the child abuse report was accurate. (Min. of Testimony)(App.004).

The second step is determining if law enforcement officers conducted a "bona fide caretaker activity." *Crawford,* 659 N.W.2d 537,543 (citing *Anderson,* 417 N.W.2d at 414. "Police officers, unlike other public employees, tend to be 'jacks of all trades,' who often act in ways totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of criminal law." *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523 (1973). "These activities, which are undertaken to help those in danger and to protect property, are part of the officer's 'community caretaking functions.' They are unrelated to the officer's duty to investigate and uncover criminal activity." *United States v. Quezada,* 448 F.3d 1005, 1007 (8th Cir. 2006).

Detective Jenkins and Detective Chance entered Defendant Kern's place of residence the first time to perform a caretaker activity - the protection of Ms. Huisman, the child protective

assessment worker, and the two minors. (Supp. Tr. p. 10 ln. 3-4, p. 14 ln. 13-15)(App.022;024).

The second time Detective Jenkins and Detective Chance entered Defendant Kern's place of residence they were carrying out the duties of a parole officer, also a caretaker activity. "He [parole officer] is an employee of . . . [Department of Corrections] who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer." *Griffin,* 483 U.S. at 876, 107 S. Ct. at 3170, 97 (1987).

In Polk County, it is normal practice for general law enforcement officers to step in and help the Probation and Parole agency with "home visits." (Supp. Tr. p. 21 ln. 24-25) (App.027). Home visits occur when parole officers go to the parolees' homes and make sure everything is going well, either randomly or after a complaint. (Supp. Tr. p. 22 ln. 1-3)(App.028).

Sergeant Garvey had another matter to attend to and delegated his authority as a parole officer to Detectives Jenkins and Chance to start the search of Kern's residence, until he -Sergeant

Garvey- arrived at the residence. (Supp. Tr. p. 27 ln. 12-20) (App.030). Thus, Detectives Jenkins and Chance were acting as caretakers in this situation.

The last part of the analysis is determining whether the public need outweighs the private intrusion. *Crawford,* 659 N.W.2d at 543 (citing *Anderson,* 417 N.W.2d at 414). It is satisfied when "a reasonable person would conclude the action . . . taken in the interest of public safety . . . was justified." *Crawford,* 659 N.W.2d at 543.

In this case, there were two minors - a 16 year old and a two-month-old child- and a parolee who lived in a house where marijuana was smoked on a regular basis and possibly sold. There were two concerns at stake: helping the persons involved to become law-abiding citizens of society, and insuring the safety of the minors. (Min. of. Testimony)(App.004). Detective Jenkins and Detective Chance did what reasonable law enforcement officers would do to secure the safety and futures of the persons involved.

In *State v. Kersh,* the Iowa Supreme Court determined that

the totality of the circumstances can also justify the community caretaker exception. 313 N.W. 2d 566, 568-569 (Iowa 1981), *abrogated on other grounds by State v. Lake,* 476 N.W.2d 55, 56 (Iowa 1991). The detective in that case received an anonymous report about the defendant's condition. After locating the defendant, the detective knocked on the window of defendant's vehicle. When there was no response, the detective opened the car door to check the defendant's condition and found a concealed weapon. *Id.* The court held that although the [anonymous] report was not enough, when combined with the officer's observations, these circumstances made the officer's actions reasonable under the community caretaker exception. *Id.*

Similarly in this case, when looking at the totality of the circumstances - the child abuse report, Detectives Jenkins and Chance's observations of Defendant Kern, the concern about ensuring public safety, and assuring the future safety of the minors - a reasonable person would conclude the officers' actions were reasonable. Furthermore, the Detectives did a valid search under

the community caretaker exception of Defendant Kern's residence.

Both approaches to the community caretaker exception show Detective Jenkins and Detective Chance acted in the public's interest and correctly did a warrantless search of Defendant Kern's residence on behalf of Sergeant Garvey, the parole and probation officer.

II. THE DISTRICT COURT CORRECTLY FOUND THE DEFENDANT GUILTY OF THE FOUR CHARGES- VIOLATIONS INVOLVING CONTROLLED SUBSTANCES- BASED ON THE SUBSTANTIAL EVIDENCE FOUND IN THE MINUTES OF TESTIMONY.

Preservation of Error: Kern waived her rights to a jury and consented to a bench trial in front of the Court. "In a bench trial, the court is the fact finder and its finding of guilt necessarily includes a finding that the evidence was sufficient to sustain a conviction. No valid purpose would be served by requiring a defendant to make a motion for judgment of acquittal in the context of a criminal bench trial." *State v. Abbas,* 561 N.W.2d 72, 74 (Iowa 1993).

Standard of Review: The Court reviews sufficiency of evidence challenges for correction of errors of law. *State v. Thomas,* 561 N.W.2d 37, 39 (Iowa 1997). When determining the sufficiency of evidence,

> a district court's finding of guilt is binding upon us [the reviewing court] unless we find there was not substantial evidence in the record to support such a finding. In determining whether there was substantial evidence, [the court] view[s] the evidence in the light most favorable to the State. *Id.* Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. In determining if there was substantial evidence, [the reviewing court] considers all of the evidence in the record, not just the evidence supporting a finding of guilt.

State v. Abbas, 561 N.W. 2d at 72 (citing *State v. Torres*, 495 N.W.2d 678, 682 (Iowa 1993)). The evidence can be direct or circumstantial, as long as [it] "raise[s] a fair inference of guilt as to each essential element of the crime [not just suspicion, speculation, or conjecture]." *State v. Casady,* 491 N.W.2d 782, 787 (Iowa 1992).

Discussion:

A. There was Substantial Evidence Showing Defendant Kern Comitted the Offenses of Conspiracy to Manufacture a Controlled Substance and Manufacturing a Controlled Substance, in Violation of Iowa Code Section 124.401(1)(d)(2011).

Under the Iowa Code, "It is unlawful for any person . . . to manufacture . . . or conspire with one or more other persons to manufacture . . . a controlled substance." § 124.401 (2011). The element of "conspire" is defined in Iowa Code Chapter 706, in relevant part, as

> Agrees with another that they or one or more of them will engage in conduct constituting the crime or an attempt or solicitation to commit the crime . . . It is not necessary for the conspirator to know the identity of each and every conspirator.

Iowa Code § 706.1 (2011).

Thus, to show sufficient evidence of this crime, the record must show: (1) Kern agreed with Grant that one or both of them would manufacture or attempt to manufacture a controlled substance, in this case marijuana; (2) Kern entered into that

agreement with intent to promote or facilitate the manufacturing; (3) Kern or Grant committed an overt act to accomplish the manufacturing of marijuana; and (4) Grant was not a law enforcement officer or assisting law enforcement when the agreement was entered. *State v. Speicher*, 625 N.W.2d 738,741 (Iowa 2001).

In *Speicher*, the Court held that to show one person agreed with another and that the other would manufacture marijuana, "a tacit understanding - one 'inherent in and inferred from the circumstances' - is sufficient to sustain a conspiracy conviction." *Id.* (citing *State v. Mapp*, 585 N.W.2d 746, 748 (Iowa 1998) (quoting 16 Am.Jur.2d *Conspiracy* § 10, at 204-05 (1998)). The court further held that the agreement can be implied or inferred by acceptance. *Id.*

The *Casady* Court found sufficient evidence to support Casady's agreement to conspire in the manufacturing activity, where he had watched a co-conspirator prepare drugs for cooking

methamphetamine, helped gather supplies, and return back to the home where the cook lab existed. *Casady,* 597 N.W.2d at 805.

Similarly, in this case, Kern was in a relationship with Grant since 1986, and they lived in this particular house since 2005. (Min. of Testimony)(App.005). The "marijuana grow" was located in the basement and the drying room was located in the spare bedroom of the home that Kern lived in for 4 years. (Min. of Testimony)(App.005). Kern's daughter - Ashlie- knew that Grant was smoking and selling "weed". (Supp. Tr. p.11 ln. 16-25) (App.023). Lastly there were offensive weapons - a 9mm hand gun, and a sawed off shotgun - located in the open around the house. (Min. of Testimony)(App.006). These circumstances would allow a reasonable jury to infer that, as in *Casady,* Kern did have an implied agreement with Grant to manufacture marijuana in their residence.

Second, Kern entered into that agreement with the intent to promote or facilitate the manufacturing. In *Fintel,* the Iowa Supreme Court held that circumstantial evidence can be used to

show intent to promote or facilitate the manufacturing of marijuana. *State v. Fintel*, 689 N.W.2d 95, 102 (Iowa 2004). In *Fintel*, the Court held there was sufficient evidence to show intent, where the defendant knew methamphetamine was manufactured in the apartment, he was present during the manufacturing process, manufacturing was done with the intention of getting "high", and the apartment was littered with the necessary supplies for manufacturing. *Id.*

Similarly, Kern lived in the home with her boyfriend for four years, which would allow a fact finder to infer she knew that marijuana was manufactured in the home and was present during the process of growing, drying, and preparing the marijuana for sale.(Min. Of Testimony)(App.005). Defendant Kern's daughter knew that Grant smoked and sold marijuana regularly, so it can be inferred that Defendant Kern also knew that the manufacturing was done with the intent of getting "high" and selling the product. (Supp. Tr. p. 11 ln. 16-25)(App.023). Lastly the supplies needed to grow and sell marijuana were scattered about the apartment and

the manner the marijuana was packaged is typical of selling marijuana. (Min. of Testimony)(App.005-006). Therefore, there is sufficient evidence in the record to show Defendant Kern had the intent to promote or facilitate the manufacturing of marijuana.

Lastly, Grant did an overt act to accomplish the conspiracy and he was not assisting the law enforcement or a law enforcement officer himself. Grant grew, dried, and processed marijuana in the residence. (Min. of Testimony)(App.005-006). He claimed responsibility for the "grow" and that it was ongoing for the past 5 months. (Min. of Testimony)(App. 005). The apartment was littered with the supplies that are commonly kept in possession of drug dealers, including individual baggies of marijuana and offensive weapons. (Min. of Testimony)(App.005)-006. This constitutes an overt act to manufacture and sell marijuana. Grant is not a known law enforcement officer, nor is he assisting a law enforcement officer. (Min. of Testimony)(App.004-007). Therefore, sufficient evidence exists for the District Court to correctly find Defendant Kern guilty of Count I and II.

B. The District Court Had Sufficient Evidence to Find Defendant Kern Guilty of Count III, Possession of Marijuana With Intent to Deliver, in Violation of Iowa Code Section 124.401(1)(d)(2011).

Under Iowa Code, it is a crime "for any person to . . . possess with the intent to . . . deliver, a controlled substance. § 124.401 (2011). The offense of possession with intent to deliver consists of two elements: knowingly possessing marijuana, and the intent to deliver it." *State v. Carter,* 696 N.W. 2d. 31, 38 (Iowa 2005). Possession can be either actual or constructive. *State v. Bash,* 670 N.W.2d 135, 138 (Iowa 2003); *State v. Maghee,* 573 N.W.2d 1, 10 (Iowa 1997).

Constructive possession exists when the accused "maintain[s] or share[s] exclusive dominion and control over the place where the drugs were found." *State v. Webb,* 648 N.W.2d 72, 76 (Iowa 2002). Constructive possession is broken down into three elements: "(1) the accused exercised dominion and control . . . over the contraband, (2) the accused had knowledge of the contraband's presence, and (3) the accused had knowledge that the material was

a narcotic." *State v. Reeves*, 209 N.W.2d 18 (Iowa 1973). This may be shown when "contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his/her dominion and control, or to the joint dominion and control of the accused and another." *Id.*

Defendant Kern had immediate and exclusive accessibility to the marijuana. She lived in the residence for four years. There were copious amounts of marijuana found in the living room and the bedroom where Defendant Kern had access and spent most of her time while at home. (Min. of Testimony)(App.005). She knew the marijuana was located on the dresser and end table in their bedroom, because it was in plain sight. (Min. of Testimony)(App.005). She also knew there was marijuana in the front room, because Grant smoked marijuana for 20 years and smoked in front of Ashlie Kern - Defendant Kern's daughter. (Supp. Tr. p. 11 Ln. 16-25)(App.023). Also, there were several more jars of marijuana in the dresser readily accessible to Defendant Kern. (Min. of Testimony)(App.005). Thus, defendant Kern had

knowledge of the marijuana and had the ability to maintain control over the narcotic, equating to constructive possession of the marijuana in the residence.

The second part focuses on Defendant Kern's intent to deliver. Inferences based on circumstantial evidence are allowed to show intent to deliver, so "the quantity and packaging of a controlled substance may be indicative of an intent to deliver." *State v. Boyd,* 224 N.W.2d 609, 612 (Iowa 1974) *disapproved on other grounds by State v. Seager,* 341 N.w.2d 420 (Iowa 1997); *State v. See,* 532 N.W.2d 166,169 (Iowa 1995) (citing *State v. Luter,* 346 N.W.2d 802, 810 (Iowa 1984)).

The law enforcement officers found 18,602.50 grams of marijuana, 18 individual plastic baggies of marijuana in the drying room, a digital scale, grinder with residue, drug notes, along with a 9 mm handgun, and sawed off shotgun in the residence. (Min. of Testimony)(App.006-007). These circumstances are indicative of Defendant Kern's intent to deliver. The record contains sufficient

evidence to support the District Court's finding of Defendant Kern's guilt of possession of a controlled substance with intent to deliver.

C. Sufficient evidence existed for the District Court to Find Defendant Kern Guilty of Failure to Affix a Tax Stamp, in Violation of Iowa Code Section 453B.12 (2011).

Failure to possess a tax stamp has three essential elements: (1) Defendant Kern was a dealer of a taxable substance; (2) Kern did not pay the State excise tax imposed on dealers and obtain stamps, labels, or other official indicia of payment; (3) Kern knowingly and intentionally possessed the taxable substance without affixing the appropriate stamps, labels, or other official indicia of payment. *State v. Maghee,* 573 N.W.2d 1, 9 (Iowa 1997); Iowa Code § 453B.12 (2011).

Under the Iowa code, a "dealer" means "any person who . . . possesses, manufactures, or produces in this state any of the following: Forty-two and one-half grams or more of processed marijuana or of a substance consisting of or containing marijuana, or one or more unprocessed marijuana plants." § 453B.1 (2011).

As discussed in subsection II(A) and II(B), there is sufficient evidence for the district court to find Defendant Kern guilty of conspiracy to manufacture and possess with intent to deliver. Since 18,602.50 grams of marijuana was processed at the residence, and Defendant Kern had constructive possession, she falls within the category of a dealer under § 453B.1 of the Iowa Code. When Detective Chance processed the marijuana, there was no tax stamp on the substance, and therefore Kern knowingly and intentionally possessed a taxable substance without obtaining the proper tax stamps for the substance.

CONCLUSION

For all the reason stated above, the State respectfully requests that this Court affirm the conviction and sentence of Christine Ann Kern.

CONDITIONAL NOTICE OF ORAL ARGUMENT

If the Court grants oral argument to Kern, the State requests to be heard in oral argument.

COST CERTIFICATE

We certify that the cost of printing Appellee's Brief and Argument was the sum of $65.00.

THOMAS J. MILLER
Attorney General of Iowa

KEVIN CMELIK
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) or (2) because:

   - This brief contains **7,108** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. P. 6.903(1)(*f*) because:

   - This brief has been prepared in a proportionally spaced typeface using WordPerfect 8.0 in Georgia font, size 14.

Kevin Cmelik
Signature

3-8-12
Date